

**PUBLIC INTEGRITY COMMISSION  
MINUTES  
February 20, 2018  
10:00 A.M.**

**1. Call to Order:** 10:10 a.m. Present: Bonnie Smith (Chair); William F. Tobin, Jr. (Vice-Chair), Michele Whetzel (Vice-Chair); Commissioners: Jeremy Anderson, Esq., Andrew Gonser, Esq.; Commission Counsel: Deborah J. Moreau, Esq.

**2. Approval of Minutes for December 19, 2017:** Moved—Commissioner Whetzel; seconded—Commissioner Gonser. Vote 4-0, accepted. (Commissioner Anderson not present).

**3. Administrative Items**

A. Lobbyist Badges—The Commission discussed having PIC create, approve and distribute lobbyist ID badges. The current system is prone to abuse because the badges do not have an expiration date and there is no mechanism for reclaiming badges from lobbyists who are no longer active or in compliance. Commission Counsel will email the active lobbyists to get their input.

B. Wi-fi and tablets—Wi-fi access will be installed in the conference room to allow the Commissioners to use their smart phones and to allow them to read electronic documents. Currently, the materials for the meeting are printed and then shredded immediately after the meeting. With a small investment in electronic tablets, the Commissioners would be able to view the documents in their electronic format during each meeting. The Commission decided to purchase electronic tablets for their use. Motion—Commissioner Tobin; seconded—Commissioner Whetzel. Vote 4-0, accepted. (Commissioner Anderson not present).

**4. Motion to go into Executive Session<sup>1</sup> to hear Requests for Advisory Opinions, Waivers and Referrals.** Moved—Commissioner Gonser; seconded—Commissioner Tobin. Vote 4-0, approved. (Commissioner Anderson not present).

**5. 18-04—Post Employment**

[Employee] previously worked for two Divisions within the Department of Health and Social Services. Between November 2017 and February 1, 2018, [Employee] worked for the Division [#1]. She was responsible for managing, budgeting and reporting grants. Prior to that position, [Employee] was [employed by Division #2] from January 2012, until November 2017. In that role [Employee] was responsible for grant administration. [Employee] left State employment effective February 2, 2018.

After leaving State service, [Employee] accepted a position with [Company]. [Company] was located in Philadelphia and offered technical writing, instructional design and project management services. Examples of the services they provided included: writing policies and procedures; work instructions; training documents; quick reference guides; standard operating procedures. At the time of the hearing, [Company] did not contract with the State but [Employee] anticipated they would seek State contracts in the future.

[Employee] asked the Commission if her status as a former State employee had an impact on [Company]'s ability to work on State contracts and whether her involvement (or lack thereof) on a State contract would affect the Commission's decision.

**For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).**

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7<sup>th</sup> Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not “directly and materially responsible” for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff’d*, No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official’s responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not “directly and materially responsible” for that particular matter.

The Federal Courts have stated that “matter” must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same “matter,” Courts have held that it is the same “matter” if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico at 842)*. See also *Beebe*.

In answer to her first question, the Commission decided that the post-employment restriction applied to [Employee]’s post-employment activities, not to the [Company]’s. Therefore, [Company] did not have to consider the post-employment restriction when applying for State contracts. Because the post-employment restriction applied to [Employee], her involvement in a State contract was the crucial factor in determining whether there would be a violation of the post-employment restriction. Ordinarily, the Commission compared the duties and responsibilities during employment to the post-employment activities in order to determine if there was substantial overlap. However, because [Company] did not have a contract with the State, it was difficult for the Commission to make a determination as to whether her involvement in a project would be a violation of the post-employment restriction. As a result, the Commission decided that she could not work on contracts between [Company] and [Division #1] until February 2020, and she could not work on contracts between [Company] and [Division #2] until after November 2019. There were no restrictions that applied to her participation in contracts between [Company] and any other State agency.

[Employee] was also reminded of the prohibition against revealing confidential information gained during her employment with the State. 29 Del. C. § 5805(d).

Motion—The post-employment restriction did not apply to [Company] and [Employee] could work on State contracts subject to the above conditions. Moved—Commissioner Gonser; seconded—Commissioner Whetzel. Vote, 4-0, approved. (Commissioner Anderson not present).

## **6. 18-05—Personal or Private Interest**

[The President] of the Board of Directors for [a subsidiary organization requested an advisory opinion]. The [subsidiary] was a non-stock, membership corporation whose sole member was [the parent entity]. Because [the parent entity] was the sole member of [the subsidiary], their interests were necessarily aligned.

During [the subsidiary's regulatory] renewal process, questions were raised as to whether members of [the parent entity's] Board of Trustees who also served on [the subsidiary's] Board of Directors had a conflict of interest. The [President of the subsidiary] consulted with a corporate attorney who concluded that:

[i]n the case of a subsidiary corporation with a sole member parent, the obligation of the subsidiary corporation is, ostensibly, to serve the interests of the parent corporation, except where the actions of the subsidiary would violate the law. Thus, in the case of [the subsidiary], a fiduciary obligation of [the subsidiary's] directors is to serve the business interests of [the parent entity], so long as the [subsidiary] does not violate any applicable law in doing so. Thus, it would appear that merely having directors, Trustees, or employees on the board of a subsidiary does not, in and of itself, give rise to a conflict of interest.

*(Citation omitted).*

The [subsidiary's] Board of Directors was comprised of 15 members. Of those 15, two members were also Trustees on [the Board of the parent entity] and four were employees of [the parent entity]. The remaining nine members were not affiliated with [the parent entity].

[The President] asked the Commission to answer the following questions:

1. Was it a conflict of interest for a member of [the parent entity's] Board of Trustees to also serve on [the subsidiary's] Board of Directors?
2. Was it a conflict of interest for [the parent entity's] employees to serve on [the subsidiary's] Board of Directors?
3. Did the number of [the subsidiary's] Board members with a potential conflict of interest (i.e. a majority or minority) have an effect on the existence of a conflict of interest?
4. Did [the subsidiary's] and [the parent entity's] Board members have a conflict of interest as it related to finances and fiduciary issues?

## **A. Jurisdiction**

A State agency is defined as “any office, department, board, commission, committee... school district, board of education and all public bodies existing by virtue of an act of the General Assembly... .” 29 Del. C. § 5804(11). [The parent entity] was a quasi-State entity, meaning it had characteristics of both a State agency and a corporation. Like a State agency, it was created by statute [*citation omitted*], its employees participated in the State benefits and pension system [*citation omitted*] and a majority of its Board members were appointed by the Governor [*citation omitted*]. In addition, [the parent entity] presented its annual budget request to the General Assembly. However, its enacting statute made clear that it was established as a corporation. [*Citation omitted*].

The Commission had previously decided that [the subsidiary's] Board members and employees were State employees. The Commission had never decided whether [the parent entity's] employees or Board members qualified as State employees and did not do so while reviewing this matter. A conflict of interest can exist between two government entities or between a government entity and a private entity. Thus, the involvement of the [subsidiary] was sufficient to confer personal jurisdiction.

**B. In their official capacity, employees may not review or dispose of matters if they have a personal or private interest in a matter before them. 29 Del. C. § 5805(a)(1).**

“A personal or private interest in a matter is an interest which tends to impair a person’s independence of judgment in the performance of the person’s duties with respect to that matter.” 29 Del. C. § 5805(a)(1). A personal or private interest is not limited to narrow definitions such as “close relatives” and “financial interest.” 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a “personal or private interest” outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*.

First, the Commission considered whether [the parent entity’s] Board members and employees had a conflict of interest. When organizations share similar goals the likelihood of a conflict is reduced but not eliminated. The law prohibits decisions where the official has a private interest. It is not limited to those situations in which the conflict arises from competing goals or interests. The Commission had previously found that being a Board member of a corporation created a personal or private interest, which carried with it a fiduciary duty to the private organization. *Commission Op. No. 06-57 (citing Oberly v. Kirby, 592 A.2d 445 (Del., 1991) (Board Director owes fiduciary duty as corporate officer and member))*. In *Oberly*, it was held that Board members have a special duty to advance [the] goals and protect [the] assets of [an entity]. As a result, the Commission decided that [the parent entity’s] Board members and employees did not have a conflict of interest simply because they were also [members of the subsidiary’s Board]. Instead, the existence, or lack, of a conflict depended on the facts of each situation. As a rule, the parent-subsidiary relationship between [the entities] would effectively remedy any conflict of interest. However, even though it was unlikely, there was still the possibility that a situation would arise where [the parent’s] and [the subsidiary’s] interests would differ, creating a conflict of interest for [the parent entity’s] Board members and employees. The number of members (i.e. a majority or minority) with a conflict had no bearing on the analysis. The conflict would be personal to the member and would exist whether or not their vote would be the deciding factor in a matter pending before [the subsidiary’s] Board.

Next, should a conflict arise, the Commission considered whether [the subsidiary’s] Board members could remedy the conflict through recusal. Courts have long recognized the remedial nature of recusal. At common law it was recognized that holding dual concurrent positions---either two positions in the public sector, or one position in the public sector and one in the private sector could result in conflicts that are “routinely cured through abstention or recusal on a specific matter.” *People Ex. Rel. v. Claar*, Ill. App. 3d, 687 N.E. 2d 557 (1997) (citing 56 Am. Jur. 2d Municipal Corporations § 172 (1971); *Reilly v. Ozzard*, 166 A.2d 360, 370 (N.J. Supr., 1960). However, it also was recognized at common law that some conflicts cannot be cured by recusal when government officials hold dual positions, regardless of sector. 63C Am. Jur. 2d Public Officers and Employees § 62, et. seq; *Annotation: Validity, Construction and Application of Regulations Regarding Outside Employment of Governmental Employees or Officers*, 62 ALR 5th 67. As a result, some courts held that when recusal from participating in decisions was not a sufficient remedy, one of the jobs must be relinquished. *People Ex. Rel. Teros v. Verbeck*, 506 N.E. 2d 464, 466 (Ill. App. 3 Dist. 1987). The courts referred to those situations as having a “clash of duties.” *Id.*; See also, *O’Connor v. Calandrillo*, 285 A.2d 275 (N.J. Super.); *aff’d.*, 296 A.2d 324, *cert. denied*, 299 A.2d 727, *cert. denied*, U.S. Sup. Ct. 412 U.S. 940; *Sector Enterprises, Inc. v. DiPalermo*, 779 F. Supp. 236 (ND. NY 1991). That common law rule applied whether the individual held two government posts or a government post and a second job in the private sector. 63C Am. Jur. 2d Public Officers and Employees § 62. The *Verbeck* Court said banning dual positions under some situations “insures that there be the appearance as well as the actuality of impartiality and undivided loyalty.” *Id.* (citing *Rogers*); See also, *O’Connor v. Calandrillo*, *supra*.

Under the law, the scope of “recusal” has been broadly interpreted. When there is a personal or private interest, an employee is to recuse from the outset and even neutral and

unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996). Thus, if [the parent entity's] Board members or employees found themselves confronted with a situation where their [position with the parent entity] was in conflict with [the subsidiary's] position, they were expected to recuse themselves from any involvement in the matter in both their [parent] and [subsidiary] roles.

**C. Employees may not engage in conduct that may raise suspicion among the public that they are engaging in conduct contrary to the public trust. 29 Del. C. § 5806(a).**

The purpose of the code is to insure that there is not only no actual violation, but also not even a "justifiable impression" of a violation. 29 Del. C. § 5802. The Commission treats that as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official's duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. See, e.g., *Commission Op. No. 97-23* and *97-42*. Those circumstances should be examined within the framework of the Code's purpose which is to achieve a balance between a "justifiable impression" that the Code is being violated by an official, while not "unduly circumscribing" their conduct so that citizens are encouraged to assume public office and employment. 29 Del. C. §§ 5802(1) and 5802(3).

The fact that the two entities had a parent-subsidiary relationship reduced any appearance of impropriety that could be created by having dual roles with [the parent] and [the subsidiary]. In addition, the appearance of impropriety could easily be mitigated by appropriate recusal.

Motion--The [parent entity's] Board members and employees who also served on [the subsidiary's] Board of Directors did not have a conflict of interest per se. In the unlikely event a situation occurred where the interests of the two entities were at odds with one another, [the members who shared an affiliation with both the parent entity] and [the subsidiary] would have to recuse themselves from involvement in the matter in both of their roles. Moved—Commissioner Anderson; seconded Commissioner Whetzel. Vote 5-0, approved.

**7. 18-02—Private Interest**

[Employee worked as a Supervisor at a specific State Agency]. [Employee] oversaw the administration of [grant monies]. Grant monies were awarded to Delaware governmental entities to purchase equipment. The State then provided free training to those purchasers. Neither the purchase monies, nor the training, were available to private enterprises. [Employee] was primarily responsible for ensuring that purchases made with grant monies were allowable under the grant's regulations.

[Employee] was also a certified instructor [in a specific field]. She wanted to work as a contractor for [a private company to provide training in the use of equipment similar to that purchased with grant monies she disbursed in her State job]. [The private company] did not contract with the State.

[Employee] recognized that it would be a conflict of interest for her to contract with grant recipients but asked the Commission to decide if she could work as a contractor for [the company] to provide training to [other private entities].

**A. In their official capacity, employees may not review or dispose of matters if they have a personal or private interest in a matter before them. 29 Del. C. § 5805(a)(1).**

A personal or private interest in a matter is an interest which tends to impair a person's independence of judgment in the performance of the person's duties with respect to that matter." 29 Del. C. § 5805(a)(1). As a matter of law, a person has a personal or private interest if any decision "with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent" than others similarly situated or if "the person or a close relative has a financial interest in a private enterprise which would be affected" by a decision on the matter to a greater or lesser degree than others similarly situated. 29 Del. C. § 5805(a)(2)(a) and (b). A personal or private interest is not limited to narrow definitions such as "close relatives" and "financial interest." 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a "personal or private interest" outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

It was difficult for the Commission to see how [Employee] could review and dispose of matters in which she had a private interest. The grant recipients were all Delaware governmental entities who received free training in the use of the equipment they had purchased. Therefore, the likelihood that [Employee] would be confronted with a situation in which a former grant recipient would contract with [the private company] to provide training at their own expense would be very small. Similarly, providing [other] services to private businesses would be unlikely to put her in a position where she would encounter former grant recipients. In the very unlikely event such a situation were to occur, [Employee] was advised to recuse herself and advise [the private company] that she could not work on that contract.

**B. Employees may not engage in conduct that may raise suspicion among the public that they are engaging in conduct contrary to the public trust. 29 Del. C. § 5806(a).**

The purpose of the code is to insure that there is not only no actual violation, but also not even a "justifiable impression" of a violation. 29 Del. C. § 5802. The Commission treats that as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official's duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. See, e.g., *Commission Op. No. 97-23 and 97-42*. Those circumstances should be examined within the framework of the Code's purpose which is to achieve a balance between a "justifiable impression" that the Code is being violated by an official, while not "unduly circumscribing" their conduct so that citizens are encouraged to assume public office and employment. 29 Del. C. §§ 5802(1) and 5802(3).

[Employee] recognized the fact that contracting with grant recipients would create an impression of impropriety. So, too, would her work on a contract between [the private company] and a grant recipient be likely to raise suspicion amongst the public that she was acting contrary to the public trust. However, the possibility of such a circumstance was extremely remote. Furthermore, [Employee] was entitled to a presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del. January 29, 1996). The Commission decided that as long as [Employee] recused herself as necessary, her part-time work with [the private company] would be unlikely to create an impression of impropriety.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considered whether the Code would be contrary to the restrictions on misuse of public office. 29 Del. C. § 5806(e). One prohibition considered by the Commission under that provision is the State employee may not use State time or State resources (i.e. computer, fax,

phone, etc.) to work on the private business. Therefore, [Employee]'s part-time endeavors had to be performed outside of her State work hours.

Motion—[Employee]'s proposed contract work for [the private company] did not create a conflict of interest with her State job duties as long as she recused herself as necessary. Moved—Commissioner Whetzel; seconded—Commissioner Gonser. Vote 5-0, approved.

## **8. 18-03—Post Employment**

[Employee] worked for [a State Agency and implemented software upgrades for two different Divisions]. From August 2016 until his retirement in December 2017 he worked for [Division #1 using software A]. Between December 2015, and August 2016, [Employee] worked [for Division #2]. In that position he worked on [software B]. [Employee] included a list of active projects in which he had some involvement.

Effective January 2, 2018, [Employee] accepted employment with an [Agency] contractor, [Company].

As a [Company] employee, [Employee] asked the Commission to decide when he could resume work on the [software #2] project without violating the two year post-employment restriction in the Code of Conduct. In addition, [Employee] asked if he could work on the [software #1] project prior to the expiration of the post-employment restriction so long as he did not work with his former co-workers.

**For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).**

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7<sup>th</sup> Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not “directly and materially responsible” for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not “directly and materially responsible” for that particular matter.

The Federal Courts have stated that “matter” must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same “matter,” Courts have held that it is the same “matter” if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico at 842)*. See also *Beebe*.

To determine if there was substantial overlap, the Commission compared the duties and responsibilities during employment to the post-employment activities. Like the matter in *Beebe*, [Employee] worked on the subject matter, software applications, while working for the State. However, the court in *Beebe* drew a specific line between the subject matter and its application to specific facts. In analogous situations the Commission has approved post-employment positions for [Agency] workers who left State employment to work for one of the agency's contractors so long as they did not work on the same projects. *Commission Ops. 12-09 and 13-41*. The Commission strives for consistency in their opinions. 29 Del. C. § 5809(5).

[Employee]'s last involvement with [software #B] as a State employee was on August 29, 2016. As a result, the two year post-employment restriction would expire on August 29, 2018. [Employee] could have no further involvement with the [software #B] project until that time.

The Commission then considered the applicability of the post-employment restriction to [Employee]'s work on the [software #A] application. He last worked on that application in December 2017, with [a specific Division within the Agency]. He stated that the work he performed for the [Division] was specific to their needs and he would not be using any portion of that project to benefit his current employer if they were to contract with other State agencies, or other [Agency] groups, to provide similar services. The Commission decided that he could work on other [software #A] projects as a [Company] employee. The only restriction was that he could not work on [his former Division's] project until after the expiration of the two year post-employment restriction.

The Commission also reminded [Employee] of the prohibition against revealing confidential information gained during his employment with the State. 29 Del. C. § 5805(d).

Motion—[Employee] could not work on [software #A] projects until after August 29, 2018. He could work on other [software #B] projects as long as they did not involve the work he previously performed for [a specific Division in his State Agency]. Moved—Commissioner Anderson; seconded--Commissioner Whetzel. Vote 5-0, approved.

## **9. 18-06—Outside Employment**

[Employee] worked for [Agency #1 as an information technology worker]. He described his job duties as building and maintaining systems for State agencies including [Agency #2]. [Employee] also owned a small consulting business. [Agency #2] was considering contracting with [Employee]'s private business to develop a new [process] for their agency. [Employee] asked the Commission if he could contract privately with [Agency #2] without creating a conflict of interest in violation of the Code of Conduct.

**A. In their official capacity, employees may not review or dispose of matters if they have a personal or private interest in a matter before them. 29 Del. C. § 5805(a)(1).**

A personal or private interest in a matter is an interest which tends to impair a person's independence of judgment in the performance of the person's duties with respect to that matter." 29 Del. C. § 5805(a)(1). As a matter of law, a person has a personal or private interest if any decision "with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent" than others similarly situated or if "the person or a close relative has a financial interest in a private enterprise which would be affected" by a decision on the matter to a greater or lesser degree than others similarly situated. 29 Del. C. § 5805(a)(2)(a) and (b). A personal or private interest is not limited to narrow definitions such as "close relatives" and "financial interest." 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a "personal or private interest" outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*. When there is a personal or private interest, the official



is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

At the meeting [Employee] admitted that he had worked with [Agency #2] on at least two projects while employed by [Agency #1]. When asked why [Agency #2] could not obtain the same services through [Agency #1], rather than contracting with [Employee], he stated that he did not know.

[Employee] had worked with [Agency #2] as part of his State job duties, developing the same type of product his business would provide. In addition, a contract between his business and [Agency #2] would create a direct financial benefit to [Employee]. As a result, he would have a conflict of interest as a matter of law.

**B. Employees may not engage in conduct that may raise suspicion among the public that they are engaging in conduct contrary to the public trust. 29 Del. C. § 5806(a).**

The purpose of the code is to insure that there is not only no actual violation, but also not even a “justifiable impression” of a violation. 29 Del. C. § 5802. The Commission treats that as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official's duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. See, e.g., *Commission Op. No. 97-23* and *97-42*. Those circumstances should be examined within the framework of the Code's purpose which is to achieve a balance between a “justifiable impression” that the Code is being violated by an official, while not “unduly circumscribing” their conduct so that citizens are encouraged to assume public office and employment. 29 Del. C. §§ 5802(1) and 5802(3).

A private contract between [Employee] and [Agency #2], when the same services could be provided through [Agency #1] was likely to create an appearance of impropriety. The public would likely wonder why a private business owned by a State employee was awarded a contract for services that could easily be provided by a State agency.

Motion--A contract between [Employee] and [Agency #2] would create a conflict of interest as a matter of law and create an appearance of impropriety amongst the public. Moved—Commissioner Whetzel; seconded Commissioner Tobin. Vote 5-0, approved.

**10. 18-09—Outside Employment**

[Employee] worked [in the enforcement section of a State agency]. He was assigned to Kent and Sussex Counties. [Employee] had regular contact with other State agencies, Federal and State law enforcement agencies and the general public. The [Agency] required [Employee] to be on call one week of every five week period.

[Employee] wanted to accept a part-time position with a [Town to perform similar job duties]. [Agency] did not have a contractual relationship with [Town] but did have regulatory oversight over them.

[Employee] asked the Commission if his part-time work for the [Town], or any municipality, would create a conflict of interest with his State job duties.

**(A) Under 29 Del. C. § 5806(b), State employees may not accept other employment if acceptance may result in:**

**(1) impaired judgment in performing official duties:**

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). It was difficult for the Commission to see how the part-time position would affect [Employee]'s judgment while performing his State job duties. While both positions involved some type of enforcement work, his State job [focused on a specific area] and the [Town] position involved [job duties in a different area]. When asked if it would be possible that he would encounter [Town employees] while working in his State capacity, [Employee] indicated the only possible way that could happen would be if [Agency] was called to [an] emergency in [Town]. In that instance, he would be working in a collaborative effort with the [Town] and the Commission did not see how it would interfere with his ability to perform his official State job duties.

**(2) preferential treatment to any person:**

The next concern addressed by the statute is to insure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] may not represent or assist a private interest before his own agency. 29 Del. C. § 5805(b)(1). [Agency] did not have a routine regulatory, or contractual relationship, with [Town]. As a result, it was highly unlikely that his colleagues from either job would have contact with each other. Therefore, the likelihood [Employee]'s part-time work would result in preferential treatment being extended to anyone was very remote.

**(3) official decisions outside official channels:**

[Employee]'s State job involved job duties similar, but unrelated to, his Town job duties. Given the different focus between the two positions, there did not appear to be any way he could influence official decisions outside official channels. That was not to say he would do so, he was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

**(4) any adverse effect on the public's confidence in the integrity of its government:**

The purpose of the code is to insure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 Del. C. § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). There were no obvious conflicts between the two positions which would be likely to adversely affect the public's confidence in their government.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considered whether the Code would be contrary to the restrictions on misuse of public office. 29 Del. C. § 5806(e). One prohibition considered by the Commission under that provision was that the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. [Employee] stated he would work at his part-time job outside of State work hours. The Commission reminded him that the prohibition not only applied to his physical presence, but also applied to phone calls and paperwork.

Motion--[Employee]'s part-time work did not create a conflict of interest with his State job duties. Moved—Commissioner Gonser; seconded--Commissioner Whetzel. Vote 5-0, approved.

[Employee] accepted a position as the Director of [a State Agency]. His job duties were set forth in [citation omitted] and included: employing and supervising employees; budget preparation; creating policies and procedures; entering into agreements with user agencies and others. While [Agency]'s enabling statute conferred most of its power on the Director, the [Agency's] Board was in the process of approving a new regulation which would allow the Director to recuse himself in appropriate circumstances.

Under the existing regulations, matters brought to the attention of the Director that required investigation, were assigned to an investigator. The Director was not the employee tasked with conducting the investigation. When the investigation was complete, the matter was presented to the Board for a hearing and resolution. Because [Employee] was not a member of the Board he did not vote. [Agency] had an existing conflict policy to guide [employees] when an investigation involved family members of an [Agency] employee.

[Employee] also [worked for a municipality over which his agency had jurisdiction]. He wanted to continue to work for the [Town] on a part-time basis in order to maintain [a professional license]. The [Town's] employees were subject to the rules and regulations [promulgated by the Agency].

**A. In their official capacity, employees may not review or dispose of matters if they have a personal or private interest in a matter before them. 29 Del. C. § 5805(a)(1).**

“A personal or private interest in a matter is an interest which tends to impair a person’s independence of judgment in the performance of the person’s duties with respect to that matter.” 29 Del. C. § 5805(a)(1). A personal or private interest is not limited to narrow definitions such as “close relatives” and “financial interest.” 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a “personal or private interest” outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*.

The Commission examined [Employee]'s dual roles as the Director of the [Agency] and as a municipal [employee] and found that his work in one capacity was unlikely to affect his professional judgment when performing his job duties in the other capacity. While [Employee] has access to [Agency information] in both positions (one as an administrator and one as a user), he had different log-in credentials which controlled his level of access and would prevent him from performing duties related to his other position. After consideration, the Commission decided that his dual roles, by themselves, did not create a conflict of interest under the State Code of Conduct. However, that did not mean that a conflict of interest would not arise in the future. At the meeting [Employee] was asked how he would handle an [Agency] investigation into [a Town employee]. He stated in that case, he would recuse himself from both sides of the matter. While [the Agency's] enabling statute did not permit his recusal, the practice had been allowed by the Board on an informal basis.

The Commission then considered whether recusal would be an adequate remedy to any conflict of interest that could arise. Courts have long recognized the remedial nature of recusal. At common law it was recognized that holding dual concurrent positions---either two positions in the public sector, or one position in the public sector and one in the private sector could result in conflicts that are “routinely cured through abstention or recusal on a specific matter.” *People Ex. Rel. v. Claar*, Ill. App. 3d, 687 N.E. 2d 557 (1997) (citing 56 Am. Jur. 2d *Municipal Corporations* § 172 (1971); *Reilly v. Ozzard*, 166 A.2d 360, 370 (N.J. Supr., 1960). However, it also was recognized at common law that some conflicts cannot be cured by recusal when government officials hold dual positions, regardless of sector. 63C Am. Jur. 2d *Public Officers and Employees* § 62, et. seq; *Annotation: Validity, Construction and Application of Regulations Regarding Outside Employment of Governmental Employees or Officers*, 62 ALR 5th 67. As a result, some courts held that when recusal from participating in decisions was not a sufficient remedy, one of the jobs must be relinquished. *People Ex. Rel. Teros v. Verbeck*, 506 N.E. 2d

464, 466 (Ill. App. 3 Dist. 1987). The courts referred to those situations as having a “clash of duties.” *Id.*; See also, *O’Connor v. Calandrillo*, 285 A.2d 275 (N.J. Super.); *aff’d.*, 296 A.2d 324, *cert. denied*, 299 A.2d 727, *cert. denied*, U.S. Sup. Ct. 412 U.S. 940; *Sector Enterprises, Inc. v. DiPalermo*, 779 F. Supp. 236 (ND. NY 1991). That common law rule applied whether the individual held two government posts or a government post and a second job in the private sector. 63C Am. Jur. 2d *Public Officers and Employees* § 62. The Verbeck Court said banning dual positions under some situations “insures that there be the appearance as well as the actuality of impartiality and undivided loyalty.” *Id.* (citing *Rogers*); See also, *O’Connor v. Calandrillo*, *supra*.

In this case, the Commission decided that [Employee]’s recusal would be an adequate remedy to mitigate any conflicts of interest. The [Agency’s] Board had already decided to formalize his ability to recuse himself by creating a new regulation which would allow him to recuse when necessary. He was made aware that under the law, the scope of “recusal” had been broadly interpreted. When there is a personal or private interest, an employee is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del., January 29, 1996).

**B. Employees may not engage in conduct that may raise suspicion among the public that they are engaging in conduct contrary to the public trust. 29 Del. C. § 5806(a).**

The purpose of the code is to insure that there is not only no actual violation, but also not even a “justifiable impression” of a violation. 29 Del. C. § 5802. The Commission treats that as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official’s duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. See, e.g., *Commission Op. No. 97-23* and *97-42*. Those circumstances should be examined within the framework of the Code’s purpose which is to achieve a balance between a “justifiable impression” that the Code is being violated by an official, while not “unduly circumscribing” their conduct so that citizens are encouraged to assume public office and employment. 29 Del. C. §§ 5802(1) and 5802(3).

The Commission decided that [Employee]’s ability to recuse himself would adequately address any appearance of impropriety that could be created by a conflict of interest. Furthermore, his recusal would assure the public that he was not engaged in conduct that was contrary to the public trust.

Motion—[Employee]’s dual roles as Director of [Agency] and as a [Town employee] did not, by themselves, create a conflict of interest. If a conflict of interest were to arise, he should recuse himself as necessary. Moved—Commissioner Anderson; seconded—Commissioner Tobin. Vote 5-0, approved.

**12. Motion to Go out of Executive Session:** Motion--Commissioner Whetzel; seconded—Commissioner Tobin. Vote 5-0, approved.

**13. Adjournment—**Next meeting March 20, 2018.

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<sup>i</sup> Pursuant to 29 Del. C. § 10004(6) to discuss non-public records (29 Del. C. § 10002(6) Any records specifically exempted from public disclosure by statute or common law), as the written statements required for advisory opinions and complaints are subject to the confidentiality standards in 29 Del. C. § 5805(f), 29 Del. C. § 5807(d) Advisory Opinion Requests, and 29 Del. C. § 5810(h) for Complaints. Further, the proceedings, like personnel actions are, by statute, closed unless the applicant for the advisory opinion requests a public meeting, 29 Del. C. § 5805(f), 29 Del. C. § 5807(d), or the person charged in a complaint requests a public meeting. 29 Del. C. § 5810(h). No applicant for an advisory opinion, nor a person charged by a complaint has requested an open meeting.